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# Due Process and the Myth of Sovereignty

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## ***Symposium – Blocking the Courthouse Door: Federal Civil Procedure Obstacles to Justice***

### **Due Process and the Myth of Sovereignty**

*Michael Vitiello\**

In *Animating Civil Procedure*, I argued that the Supreme Court has repeatedly used procedural law as a way to narrow access to our courts.<sup>1</sup> Most often, the right wing of the Court has led the way and done so in cases where powerful entities, often mega-corporations, are the beneficiaries of the Court's decision.<sup>2</sup> I further argued that the public does not react to such decisions or if members of the public do so, their responses are far more tepid than their responses to the Court's controversial substantive decisions.<sup>3</sup> The net result of the Court's procedural activism is to erode the rule of law: access to court is a hallmark of our system of justice and closing the courthouse door prevents many defendants from answering for harm that those entities have caused.<sup>4</sup>

*Animating Civil Procedure* focused on the Roberts Court's personal jurisdiction case law. In the modern world of expanded interstate and international trade and travel, with instant efficient and inexpensive communication across the globe, one would have thought that the jurisdiction arm of our courts would lengthen to ensure that plaintiffs have ready access to a convenient court.<sup>5</sup> The Court's recent personal jurisdiction cases have repeatedly narrowed the court's jurisdictional reach.<sup>6</sup> In 2017, after publication of my book, the Court again ruled against a group of plaintiffs in favor of a multibillion-dollar corporation in a decision that leaves many civil procedure scholars stunned. *Bristol-Myers Squibb Co. v. Superior Court (BMS)* is yet another major example of the Court's new protection for corporate defendants.<sup>7</sup>

Imagine that plaintiffs from around the United States used a multibillion-dollar pharmaceutical company's product.<sup>8</sup> Imagine also that resident and non-resident

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1. MICHAEL VITIELLO, *ANIMATING CIVIL PROCEDURE* xiv–xv (2017).

2. *Id.* at 3.

3. *Id.* at xiv–xv.

4. *Id.* at 64.

5. *Id.* at 22.

6. Joan R. Camagong, *Recent Developments in Personal Jurisdiction*, 20 A.B.A. TORTSOURCE 10 (2018).

7. 137 S. Ct. 1773 (2017).

8. *Id.*

plaintiffs attempted to join in a single lawsuit against the defendant in California, a state where the defendant has several hundred employees and maintains various facilities, including research laboratories near the Silicon Valley, and sells hundreds of millions of pills alleged to have caused the plaintiffs' injuries.<sup>9</sup> Imagine finally that the pharmaceutical company made almost a billion dollars from sales in California alone over a several year period.<sup>10</sup> Does a California court have personal jurisdiction over the defendant such that it can hear claims not only by Californians but also out-of-state plaintiffs?

For so many reasons, one might have thought that the corporation received many benefits from serving the California market, had such a large "presence" within the state, and could claim no inconvenience in defending in the forum state that jurisdiction would be a foregone conclusion.<sup>11</sup> Not so under the Roberts' Court jurisdiction-shrinking view of due process.<sup>12</sup>

A number of scholars have criticized *BMS*.<sup>13</sup> For example, Professor Mike Hoffheimer has called the Court's decision part of a "stealth revolution," whereby the Roberts Court has spoken as if it is merely applying traditional due process doctrine to new sets of facts.<sup>14</sup> The Court claims this is the case despite the fact that it has repeatedly narrowed access to courts, radically altering traditional doctrine.<sup>15</sup>

I use this opportunity to make a different point about *BMS* and the Court's analysis of due process. As I discussed in *Animating Civil Procedure*, the Court has never offered a compelling explanation for why its due process test focuses on anything more than whether a defendant had fair notice and an opportunity to be heard.<sup>16</sup> While that protection seems to underlie the Court's "reasonableness" analysis, the Court requires more than a showing that a defendant is not burdened by answering a suit in an otherwise entirely convenient forum.<sup>17</sup>

The Court's formula for personal jurisdiction states that a defendant must have sufficient minimum contacts with a forum state so that the assertion of jurisdiction comports with traditional notions of fair play and substantial justice.<sup>18</sup> Most often, when the Court has narrowed access to court, it has used the minimum contacts part of its test to erect a barrier to suit.<sup>19</sup> As I have argued elsewhere, the Court has

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9. *Id.*

10. *Id.*

11. VITIELLO, *supra* note 1, at 27.

12. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1773.

13. See Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251 (2018); Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 504 (2018).

14. Hoffheimer, *supra* note 13, at 505.

15. *Id.* at 549.

16. VITIELLO, *supra* note 1, at 35–36.

17. *Id.* at 28.

18. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

19. VITIELLO, *supra* note 1, at 36.

never offered a compelling explanation for why minimum contacts with the forum are important even in instances where a plaintiff has brought suit in a forum that is uncontestably convenient for the defendant.<sup>20</sup> The Court has offered a number of explanations, including briefly and unconvincingly a state's interest to protect its residents from being haled into court in another forum.<sup>21</sup> *BMS* seems to revert to that explanation for the importance of the contacts part of the Court's due process analysis.<sup>22</sup> Somehow, federalism explains why jurisdiction is improper for some reason that is hard to articulate.<sup>23</sup>

This explanation is yet another example of an unconvincing make-weight to justify protecting corporate defendants from defending themselves in otherwise entirely convenient fora, and indeed, often in states where those corporations are reaping in billions of dollars from their in-state business activities.

Part I of this paper examines *BMS*.<sup>24</sup> Part II examines the Court's previous unconvincing efforts to explain the relevance of federalism in its due process analysis.<sup>25</sup> It also explores the *BMS* Court's justification for this rationale in light of historic understanding of jurisdiction and in light of modern commercial realities.<sup>26</sup> Part III reviews scholarly efforts to explain *BMS*. There, I also explore what policies might explain the willingness of the liberal wing of the Court to join a decision that obviously favors mega-corporations.<sup>27</sup> At the end of the day, the Court's analysis is a make-weight to justify shutting the courthouse door without plausible grounding in due process.<sup>28</sup>

## I. PART I

Bristol-Myers Squibb (*BMS*) is one of the largest pharmaceutical companies in the world with thousands of employees and about \$20 billion in revenue annually.<sup>29</sup> While over half of its work force is in New York and New Jersey, the company has a large footprint in California.<sup>30</sup> *BMS* has five laboratories in California where about 160 employees work.<sup>31</sup> It has a sales force of about 250

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20. *Id.* at 37; Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 UC DAVIS J. OF INT'L LAW & POL'Y 209, 217–18 (2015).

21. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

22. *See infra* Part I.

23. *Id.*

24. *Id.*

25. *See infra* Part II.

26. *Id.*

27. *See infra* Part III.

28. *Id.*

29. *Bristol-Myers Squibb Company History*, FUNDINGUNIVERSE, <http://www.fundinguniverse.com/company-histories/bristol-myers-squibb-company-history/> (last visited Feb. 4, 2019) (on file with *The University of the Pacific Law Review*).

30. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.

31. *Id.*

people in the state and a state-government advocacy office in Sacramento.<sup>32</sup>

BMS produces and sells Plavix, a blood thinner.<sup>33</sup> In the early 2000's, Plavix was BMS's best-selling product.<sup>34</sup> Indeed, in 2009, U.S. sales of Plavix exceeded \$9 billion.<sup>35</sup> The manufacturing, labeling, and work on gaining regulatory approval of Plavix did not take place in California.<sup>36</sup> Between 2006 and 2016, BMS sold about 187 million Plavix pills in California, taking in more than \$900 million from those sales over that period of time.<sup>37</sup> Beyond doubt, BMS sold many other drugs in California as well.<sup>38</sup>

When concerns surfaced about Plavix's side effects, a large group of plaintiffs, including California residents and residents from 33 other states, filed complaints against BMS in California state court.<sup>39</sup> The nonresident plaintiffs did not allege any facts connecting their purchase of the drug with California or any other way that their injuries arose out of forum activity.<sup>40</sup> For example, they did not allege that they bought Plavix while they were in the state or that BMS marketed the drug nationwide from California.<sup>41</sup> BMS retained McKesson Corporation, headquartered in California, to distribute Plavix nationwide.<sup>42</sup> The non-California plaintiffs, however, did not allege that McKesson's marketed activities resulted in their purchases of Plavix.<sup>43</sup>

BMS moved to dismiss the nonresidents' complaints on the grounds that the court lacked personal jurisdiction over BMS.<sup>44</sup> The California Court of Appeal and Supreme Court held that the court had personal jurisdiction.<sup>45</sup> The United States Supreme Court reversed.<sup>46</sup>

The plaintiffs filed their actions in 2012, after the Supreme Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>47</sup> but before the Court's

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32. *Id.*

33. *Id.*

34. John Carreyrou & Joann S. Lublin, *How Bristol-Myers Fumbled Defense of \$4 Billion Drug*, WALL ST. J., (Sept. 2, 2006, 12:01 AM), <https://www.wsj.com/articles/SB115716250362552502> (on file with *The University of the Pacific Law Review*).

35. Eric E.J. Topol & Nicholas N.J. Schork, *Catapulting Clopidogrel Pharmacogenomics Forward*, 17 NATURE MED. 40, 40 (2011).

36. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.

37. *Id.*

38. See *Shop Bristol-Myers Squibb Pharmaceuticals*, MCKESSON, <https://mms.mckesson.com/catalog?node=402975+5566559> (last visited Feb. 4, 2019) (on file with *The University of the Pacific Law Review*).

39. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.

40. *Id.*

41. *Id.*

42. *Id.* at 1777.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1778.

47. 564 U.S. 915 (2011).

decision in *Daimler AG v. Bauman*.<sup>48</sup> Despite indications in *Goodyear* that the Court was about to narrow general jurisdiction, the California trial court found that jurisdiction was proper under a general jurisdiction theory.<sup>49</sup> By the time the case arrived in the California Court of Appeal, the Supreme Court had decided *Daimler*, dramatically narrowing general jurisdiction.<sup>50</sup> While the California appellate and Supreme Court found that jurisdiction was not proper under a general jurisdiction theory, they found that jurisdiction was proper under a specific jurisdiction theory.<sup>51</sup>

Clearly, California courts had personal jurisdiction over BMS for purposes of suits by Californian plaintiffs who purchased and used Plavix in California.<sup>52</sup> The case for jurisdiction over those claims was air-tight: BMS acted with purpose in selling the harm-causing product in-state.<sup>53</sup> Since the development of its contacts analysis, the Supreme Court has interchangeably stated the black letter law: a claim had to either arise out of or be related to the defendant's in-state contacts.<sup>54</sup> Chief Justice Cantil-Sakauye relied on the "related to" language to uphold jurisdiction over BMS in claims by non-resident plaintiffs: "A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate."<sup>55</sup> She went further to apply a theory recognized by some courts: sometimes called a "sliding scale" analysis.<sup>56</sup> Thus, even if a claim does not arise out of the forum contacts, jurisdiction may be proper in light of substantial contacts with the forum. The Chief Justice also found that the assertion of jurisdiction satisfied the reasonableness part of the Supreme Court's due process analysis.<sup>57</sup>

The Supreme Court disagreed.<sup>58</sup> Writing for the Court, Justice Alito focused on what now seems significant (but something that in the past seemed quite irrelevant): BMS, a massive international corporation, conducted most of its activity outside of California.<sup>59</sup> Justice Alito also focused on other facts unrelated to California. First, the nonresident plaintiffs did not obtain the drug from

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48. 571 U.S. 117 (2014).

49. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.

50. *Id.*

51. *Id.* at 1778–79.

52. *Id.* at 1781.

53. *Id.* at 1786.

54. See *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (Brennan, J., dissenting).

55. *Bristol-Myers Squibb Co. v. Super. Court*, 1 Cal. 5th 783, 803 (2016).

56. *Id.* at 792.

57. *Id.* at 808.

58. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.

59. VITIELLO, *supra* note 1, at 57.

California. Second, BMS did not manufacture or distribute the drug in California.<sup>60</sup> Third, BMS did not work on regulatory compliance material from California.<sup>61</sup> Finally, although Justice Alito recognized that BMS hired McKesson, headquartered in California, to develop its marketing strategy, the nonresident plaintiffs did not allege that BMS directed its marketing strategy from California.<sup>62</sup>

The Court's opinion ends any argument that a plaintiff can rely on a sliding-scale approach to jurisdiction.<sup>63</sup> According to Justice Alito, that approach effectively is a general jurisdiction theory dressed up in specific jurisdiction language.<sup>64</sup>

The most important part of Justice Alito's discussion for purposes of this paper is his explanation of the role of federalism and state borders in defining the Court's due process test. In discussing the limitations imposed by Fourteenth Amendment due process, Justice Alito did not make a clear distinction between the minimum contacts analysis and the reasonableness part of the analysis.<sup>65</sup> In some cases, the Court has focused on the separate aspects of its analysis as serving distinct interests. Thus, in *World-Wide Volkswagen*, the Court did not reach its reasonableness analysis because it found that the defendants, a New York car dealer and a New York—New Jersey—Connecticut distributor, lacked sufficient contacts with the forum state because they did no purposeful act within the state.<sup>66</sup> Further, Justice White's majority opinion explained the contacts part of the analysis in federalism terms.<sup>67</sup>

Justice Alito did not make that the clear distinction between contacts analysis and fairness-reasonableness factors.<sup>68</sup> Instead of focusing on contacts as a separate step in the analysis, he seemed to lump the two aspects of the Court's test, but to explain the due process test in terms of federalism.<sup>69</sup> As he stated for the Court, "In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include 'the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice.'"<sup>70</sup> Beyond that though, he observed that the "primary concern" of the Court's due process analysis is "the burden on the defendant."<sup>71</sup> This discussion seems like the fairness-reasonableness part of the analysis, effectively a balancing of competing interests.

What is new in the Court's analysis is the unusual importance of the burden

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60. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.

61. *Id.* at 1778.

62. *Id.* at 1783.

63. *Id.* at 1781.

64. *Id.*

65. *Id.* at 1779.

66. *World-Wide Volkswagen Corp.*, 444 U.S. at 295.

67. *Id.* at 293.

68. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780–81.

69. *Id.* at 1780–81.

70. *Id.* at 1780.

71. *Id.*

on the defendant that somehow weaves in federalism concerns. Here is a fairly extensive quotation of that point:

Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question . . . As we have put it, restrictions on personal jurisdiction “are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.” . . . “[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States” . . . And at times, this federalism interest may be decisive. As we explained in *World-Wide Volkswagen*, “[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”<sup>72</sup>

As indicated above, the Court previously organized the analysis differently, first deciding the sufficiency of the contacts and second, only if the contacts were sufficient would it turn to the reasonableness factors.<sup>73</sup> In Justice White’s view, federalism explained the contacts part of the analysis, while the due process assessment would follow only after a court found sufficient contacts.<sup>74</sup> Justice Alito merged the questions: in evaluating the burden on the defendant, a court must evaluate federalism and state sovereignty considerations.<sup>75</sup>

After reciting the special importance of the burden on the defendant (with particular emphasis on sovereignty), the Court seemed to return to the lack of sufficient contacts with the forum. It did not find, for example, that BMS faced any particular burden in defending the several suits in California.<sup>76</sup> That is, while BMS had extensive contacts with the forum, the nonresident plaintiffs’ claims did not arise out of those contacts.<sup>77</sup> Perhaps the case did not turn on any special burden faced by BMS in defending in California because it admitted that it faced no special

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72. *Id.* at 1776, 1780

73. *Id.* at 1780.

74. *World-Wide Volkswagen Corp.*, 444 U.S. at 294.

75. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780–81.

76. *Id.* at 1781.

77. *Id.*



burden in defending there.<sup>78</sup>

In finding that the assertion of jurisdiction over the nonresidents' claims violated due process, Justice Alito insisted that the Court was applying traditional due process principles.<sup>79</sup> That is more than debatable.<sup>80</sup> The next section focuses on some of the Court's earlier efforts to explain the significance of states' interest in the jurisdictional arena.

## II. PART II

Professor Rich Freer and Dean Wendy Perdue's case book poses a question in notes after *International Shoe v. Washington*. The hypothetical starts with an International Shoe delivery truck striking a pedestrian in Colorado.<sup>81</sup> The pedestrian has a vacation home in Illinois, located quite close to St. Louis, Missouri, where International Shoe has its headquarters. Deciding that it would be quite convenient to litigate in Illinois, the pedestrian wants to file suit in that state. The editors ask whether the pedestrian can do so.<sup>82</sup>

The question presents students with the tension between contacts analysis and what would seem to be the limitations imposed by the Fourteenth Amendment's due process clause. Assume that, instead of merely being convenient to bring suit in Illinois, the pedestrian had an especially strong interest in filing suit there. For example, assume that the Colorado accident led to significant physical impairment, leaving him bedridden and in need of special care provided near his Illinois home. Indeed, add an additional fact: the nearest courthouse in Missouri is located many miles further away from International Shoe's headquarters than is the courthouse in Illinois. Would an Illinois court's assertion of personal jurisdiction over International Shoe really violate due process?<sup>83</sup>

The answer is counterintuitive and unequivocally, yes. But the reason why is more of a historical anomaly than it is a matter of principle.

Think back to *Pennoyer v. Neff*.<sup>84</sup> There, attorney Mitchell sued farmer Neff, one of his clients, for payment of a fee for legal services. Mitchell began the suit in personam but had process served by publication in a newspaper, the appropriate method for commencing a suit in rem.<sup>85</sup> When Neff did not respond to the suit, the court entered a default judgment.<sup>86</sup> To satisfy the judgment, the sheriff sold land

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78. See Bradt & Rave, *supra* note 13, at 1277.

79. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1779; Hoffheimer, *supra* note 13, at 523.

80. Hoffheimer, *supra* note 13, at 523.

81. RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 44 (7th ed. 2016).

82. *Id.*

83. Cf. VITIELLO, *supra* note 1, at 36.

84. 95 U.S. 714 (1877).

85. *Id.* at 714–15.

86. *Id.* at 720.

that Neff owned.<sup>87</sup> Subsequently, Neff sued Pennoyer, who had bought the land after the sheriff's sale, for ejectment.<sup>88</sup> Pennoyer claimed ownership through the default judgment.<sup>89</sup>

The Supreme Court found for Neff.<sup>90</sup> A court would have to give effect to a judgment unless the judgment was improperly entered.<sup>91</sup> Here, the Court found that the judgment was improper: the action was one in personam but Neff was not served in-hand, in-state in the original action.<sup>92</sup> The Court reasoned that a state lacks authority to reach into another state to assert jurisdiction over a defendant in that state.<sup>93</sup> A contrary holding would violate principles of international law: one sovereign lacks the authority to assert extraterritorial jurisdiction.<sup>94</sup>

Had that been the end of the Court's analysis, the Court would have spared generations of law students the horror of reading its ornate decision. But in an elaborate dicta, the Court reasoned that its holding found support in the recently enacted Fourteenth Amendment.<sup>95</sup>

Linking the requirement of in-hand, in-state service, seemingly justified based on principles of public international law, and Fourteenth Amendment due process is certainly an odd connection.<sup>96</sup> The international law principle defends the rights of sovereign states.<sup>97</sup> The Fourteenth Amendment by its own terms limits states' power.<sup>98</sup> Indeed, the Civil War largely repudiated the international principle that states within the union retained full sovereign powers.<sup>99</sup>

The Court would eventually recognize *Pennoyer's* fallacy. Even while searching for a new explanation of the role of state sovereignty in its due process analysis, the Court rejected "the shibboleth that '[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,'" i.e., *Pennoyer's* rationale.<sup>100</sup>

The evolution of the Court's due process analysis from *Pennoyer* to modern contacts analysis is a familiar story. The development of modern transportation ushered in the need for expanding the states' jurisdictional reach: a motorist from

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87. *Id.* at 724.

88. *Id.* at 715.

89. *Id.* at 720.

90. *Id.* at 736.

91. *Id.* at 728.

92. *Id.* at 727–28.

93. *Id.* at 733.

94. *Id.* at 730.

95. *Id.* at 732.

96. VITIELLO, *supra* note 1, at 23.

97. Harold S. Lewis, *Three Deaths of State Sovereignty and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 704 (1983).

98. Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163, 169 (1998).

99. VITIELLO, *supra* note 1, at 23.

100. *World-Wide Volkswagen Corp.*, 444 U.S. at 293.

out-of-state could cause damage in-state and leave before in-hand, in-state service of process.<sup>101</sup> States created consent statutes, initially requiring an out-of-state motorist to appoint an in-state agent for purpose of receiving service of process.<sup>102</sup> Eventually, states adopted implied consent statutes, whereby driving on a state's highway amounted to consent that allowed an injured person to serve the out-of-state resident with process by serving a state official.<sup>103</sup>

International Shoe, a corporation with its headquarters in Missouri, had a workforce in Washington.<sup>104</sup> Over the course of several years, it refused to pay funds into Washington's unemployment compensation fund.<sup>105</sup> The Court rejected International Shoe's efforts to frame the question of personal jurisdiction in terms of corporate presence in-state.<sup>106</sup> Instead, it reformulated the test in now-familiar terms: "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>107</sup> Commentators have observed that *International Shoe* does not provide much in the way of a clear theoretical framework.<sup>108</sup> In reliance on cases that had eroded *Pennoyer's* rigid rule, the Court focused on notions of quid pro quo: a defendant with sufficient contacts with the forum state benefitted from in-state contacts, creating a reciprocal benefit to respond to a suit in-state.<sup>109</sup> The Court also made a passing reference to "our federal system of government."<sup>110</sup>

While *International Shoe* pointed in different directions on the relationship of due process and state sovereignty, *McGee v. International Life* seemed to have developed a coherent theory.<sup>111</sup> There, a Texas insurance company refused to pay the proceeds of a life insurance policy to McGee, the named beneficiary of the policy, after her son died.<sup>112</sup> McGee sued in California; International Life failed to appear and McGee received a default judgment.<sup>113</sup> When McGee attempted to collect on the judgment, the Texas courts refused to enforce the judgment on

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101. *Hess v. Pawloski*, 274 U.S. 352 (1927); *Kane v. N.J.*, 242 U.S. 160 (1916).

102. Edwin W. Scott & Michael R. Bradley, *Civil Procedure—Nonresident Motorist Statutes—Extent to Which Jurisdiction May Be Acquired*, 7 VILL. L. REV. 472, 473 (1962).

103. *Id.* at 474.

104. *Id.* at 310.

105. *Id.* at 311.

106. *Id.* at 315.

107. *Id.* at 316.

108. Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. L. REV. 774, 775 (2016).

109. *Int'l Shoe Co.*, 326 U.S. at 319.

110. *Id.* at 317.

111. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); VITIELLO, *supra* note 1, at 27.

112. *Id.* at 222.

113. *Id.* at 221.

grounds that the California court lacked personal jurisdiction over the defendant.<sup>114</sup>

Writing for a unanimous Court, Justice Black's opinion articulated the modern view of due process.<sup>115</sup> The Court focused on the ease of modern transportation and communication as relevant to the Court's analysis.<sup>116</sup> Unlike *Pennoyer*, which focused on the defendant's state's interest, *McGee* recognized the original forum state's interest in protecting its citizens.<sup>117</sup> The Court balanced a number of competing factors, including the burden on the defendant, the interest of the forum state, witness convenience, and the plaintiff's need for the original forum.<sup>118</sup> Language in *McGee* suggested the overarching theme: did the assertion of jurisdiction over the defendant by a California court deny the defendant fair notice and the opportunity to be heard?<sup>119</sup> If the answer was no, then the court did not violate the defendant's due process rights.<sup>120</sup>

I have argued elsewhere that *McGee* is the only case in which the Court articulated a coherent theory of due process.<sup>121</sup> The Fourteenth Amendment's Due Process Clause makes no reference to states' interests and its drafters were clearly repudiating the assertion by Southern States that they were separate sovereigns that were free to leave the Union.<sup>122</sup> That view of *McGee* finds linguistic support in the amendment: the assertion of jurisdiction does deprive a defendant of property or, perhaps, liberty, but if the defendant had fair notice and an opportunity to defend the suit, the judgment was valid.<sup>123</sup>

*McGee's* approach seemed to prevail for over twenty years despite a brief detour six months after the Court decided *McGee*.<sup>124</sup> Donner, a Pennsylvania resident, consulted with a Delaware trust company before she moved to Florida.<sup>125</sup> Donner set up a trust amounting to about one-third of her estate that would go to one of her daughters' children upon Donner's death.<sup>126</sup> Meanwhile, she left the other two-thirds of her estate to her other two daughters, who would benefit from her will.<sup>127</sup> Over an eight-year period, the trust company corresponded with Donner after she moved to Florida, where she died.<sup>128</sup>

The two daughters who were to inherit about \$500,000 each under Donner's

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114. *Id.*

115. *Id.* at 222.

116. *Id.* at 223.

117. *Id.* at 223.

118. *Id.* at 223–24.

119. *Id.* at 224.

120. *Id.* at 223.

121. VITIELLO, *supra* note 1, at 27; Vitiello, *supra* note 20, at 216–19.

122. VITIELLO, *supra* note 1, at 35.

123. *Id.*

124. *Id.* at 28.

125. *Hanson v. Denckla*, 357 U.S. 235, 238 (1958).

126. *Id.* at 239.

127. *Id.*

128. *Id.* at 239–340.

will sought to have the Florida probate court rule that the Delaware trust was invalid.<sup>129</sup> Had they succeeded, the trust funds would have become part of Donner's estate and would have gone to the two daughters.<sup>130</sup> The Florida court found that it had jurisdiction over the Delaware trust company.<sup>131</sup> At the same time, Elizabeth Hanson, whose sons were to receive the proceeds from the trust, brought suit in Delaware to have the trust upheld.<sup>132</sup> The Delaware court found for Hanson.<sup>133</sup> *Hanson v. Denckla* presented the Court with difficult issues, including the personal jurisdiction question.<sup>134</sup>

If the Court had applied its newly minted test from *McGee*, the two sisters would have undone Donner's donative intent and deprived their nephews of their inheritance.<sup>135</sup> The Court divided 5-4 and found that the Florida court lacked personal jurisdiction over the Delaware trust company.<sup>136</sup> Chief Justice Warren explained away *McGee*: although *McGee* failed to make the distinction, the Chief Justice claimed that International Life's contact with the forum state came about through purposeful activity in the forum state.<sup>137</sup> Justice Black's dissent pointed out that the trust company certainly knew that it had contact with Florida: it maintained a business relationship with Donner over an eight-year period.<sup>138</sup> The Chief Justice also rebutted the idea that state boundaries did not matter for due process analysis: constitutional limitations on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States."<sup>139</sup>

For many years, courts treated *McGee* as the law, often ignoring or giving short shrift to *Hanson*.<sup>140</sup> After all, not only was *Hanson* a 5-4 decision, but its result-orientation was palpable.<sup>141</sup> *McGee* found favor among many lower courts, including state courts that were expanding their reach, often to protect in-state residents against out-of-state corporate defendants.<sup>142</sup> Indeed, while narrowing in rem jurisdiction in *Shaffer v. Heitner*, the Court seemed to endorse *McGee*'s framework: there, the Court observed that the "mutually exclusive sovereignty of the States" was not a "central concern of the inquiry into personal jurisdiction."<sup>143</sup>

As observed above, sovereignty made a comeback in *World-Wide Volkswagen*

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129. *Id.* at 240.

130. *Id.* at 240.

131. *Id.* at 243.

132. *Id.* at 242.

133. *Id.*

134. *Id.* at 243.

135. VITIELLO, *supra* note 1, at 29-30.

136. *Hanson*, 357 U.S. at 254 (1958).

137. *Id.* at 253.

138. *Id.* at 257-58 (Black, J., dissenting).

139. *Id.* at 251.

140. VITIELLO, *supra* note 1, at 32.

141. *Id.*; *Hanson*, 357 U.S. at 235.

142. Vitiello, *supra* note 20, at 222.

143. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

*Corp. v. Woodson* in 1980.<sup>144</sup> *World-Wide* created a two-step framework for analysis: first, a plaintiff had to demonstrate that the defendant had sufficient minimum contacts with the forum state.<sup>145</sup> Second, only if the defendant had sufficient minimum contacts would the Court turn to the fairness-reasonableness factors.<sup>146</sup> As I often quip when teaching the case, this was something of an unholy marriage of *McGee* (the reasonableness factors) and *Hanson* (the contacts requirement). In dicta, Justice White endorsed the stream of commerce basis for jurisdiction; that is jurisdiction would be proper when a defendant shipped a component part to a state other than the forum state with awareness that the product would end up in the forum).<sup>147</sup> However, he insisted for the majority that only contacts that demonstrated purposeful availment of the forum met the due process test.<sup>148</sup>

Justice White's authority for the latter proposition was, of course, *Hanson*.<sup>149</sup> Despite having laid dormant since 1958, *Hanson* now came center stage in the Court's new due process analysis.<sup>150</sup> But what interest was served by the contacts part of the test? While disavowing *Pennoyer*'s "shibboleth," Justice White asserted that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."<sup>151</sup>

*Hanson*'s reemergence left commentators befuddled.<sup>152</sup> If *Pennoyer*'s reliance on state sovereignty was rightly called "shibboleth," how did the contacts analysis serve some state interest? Well, Justice White explained a mere two years after *World-Wide* that it did not serve a separate interest. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, Justice White recanted:

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.<sup>153</sup>

That certainly seems right, based on the language of the Due Process Clause and its history as a limitation on state power.<sup>154</sup> Indeed, writing shortly after the Court decided *Insurance Corp. of Ireland*, one scholar predicted that the decision

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144. *World-Wide Volkswagen Corp.*, 444 U.S. at 293.

145. *Id.* at 291.

146. *Id.* at 292.

147. *Id.* at 297-98.

148. *Id.* at 297.

149. *Hanson v. Denckla*, 357 U.S. 235 (1958).

150. *World-Wide Volkswagen Corp.*, 444 U.S. at 294.

151. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

152. *See Bradt & Rave*, *supra* note 13, at 1281.

153. *Ins. Corp. of Ireland*, 456 U.S. at 702 n.10.

154. VITIELLO, *supra* note 1, at 36.

signaled the death of the relevance of sovereignty as part of the personal jurisdictional analysis: “Since the Court, so soon after *World-Wide*, reached so far to dispose of state sovereignty, this third death of the concept should prove more durable.”<sup>155</sup> That prognosis, although seemingly incontestable, did not prove accurate.<sup>156</sup>

Sovereignty and the contacts analysis, somehow distinct from basic fairness, did not die. Further, the Court has not developed a coherent theory to explain the increasingly important role that minimum contacts serves. That is, if *McGee* controls, the contacts analysis is not a separate bar to jurisdiction.<sup>157</sup>

Justice Kennedy, writing for only four justices, claimed that the purposeful availment mattered because it signaled that the defendant intended to affiliate with the forum, in effect, consenting to that state’s jurisdiction.<sup>158</sup> Critics jumped on that rationale: Justice Kennedy seemed to be reintroducing the widely ridiculed and rejected implied consent rationale.<sup>159</sup> In subsequent cases, Justice Kennedy did not re-urge his theory.<sup>160</sup>

Fast-forward to the Court’s decision in *BMS*. Justice Alito did not bifurcate the analysis as Justice White did in *World-Wide*.<sup>161</sup> Instead, he seemed to be discussing the reasonableness factors, which include the burden on the defendant.<sup>162</sup> But when he explained why a court had to give special weight to the burden on the defendant, the ghost of sovereignty emerged:

Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction “are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States” . . . [T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts.<sup>163</sup>

I confess that I have little idea what Justice Alito, along with seven of his colleagues, mean in the language quoted above. I also confess that I hear a faint

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155. Lewis, *supra* note 97, at 702.

156. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773 (2017).

157. VITIELLO, *supra* note 1, at 44.

158. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011).

159. *Id.* at 901 n.5 (Ginsburg, J., dissenting).

160. See Amanda Iler, *Bridging the Stream of Commerce: Recommendations for Living in the Post-Nicastro Era*, 45 MCGEORGE L. REV. 407, 412–13 (2013).

161. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780.

162. *Id.*

163. *Id.* at 1776.

groan, Justice White's voice saying, didn't you read my mea culpa in *Insurance Corp. of Ireland*? I cannot find a plausible explanation for the Court's revived sovereignty theory. *BMS* merely reasserted, without plausible explanation, why state borders matter.

Make no bones about it, though: the reliance on sovereignty and the importance of state borders narrows access to convenient fora for plaintiffs. In *BMS*, BMS conceded that defending suit in California was not inconvenient.<sup>164</sup> How could it be inconvenient? It had to defend numerous suits brought by California citizens.<sup>165</sup> The parties consolidated the suits.<sup>166</sup> Discovery would overlap in all of the suits.<sup>167</sup> BMS has a substantial corporate presence in the state and makes many millions of dollars on its California business.<sup>168</sup> No doubt, it retains a large staff of lawyers in California.<sup>169</sup> A claim that it would not have fair notice and an opportunity to be heard on all of the claims, by in-state and out-of-state plaintiffs would be frivolous.<sup>170</sup> But future plaintiffs face fewer convenient places to sue mega-corporations where those plaintiffs choose to file their suits based on the *BMS* Court's new, narrow view of relatedness, a new rule required in some unexplained way by state sovereignty.<sup>171</sup>

Lest my comments seem flip, in the next section, I visit some scholarly attempts to explain or to justify the reliance on sovereignty.

### III. PART III

Some scholars gave *BMS* a chilly response.<sup>172</sup> For example, Professor Hoffheimer has argued that *BMS* is yet another example of the Roberts' Court's attempt to portray its radical new due process analysis as flowing naturally from controlling precedent.<sup>173</sup> A few scholars have attempted to justify or at least explain the Court's theory.

Professor Jeffrey Schmitt has argued "that the law of personal jurisdiction must take sovereignty into serious account."<sup>174</sup> Schmitt's *Rethinking the State Sovereignty Interest in Personal Jurisdiction* offers "a new interpretation of how

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164. *Id.* at 1787 (Sotomayor, J., dissenting).

165. *Id.* at 1781.

166. *Id.* at 1784.

167. *Id.* at 1786–87.

168. *Id.* at 1778.

169. *Job Search Results*, BRISTOL–MYERS SQUIBB, <https://www.bms.com/job-seekers/job-search-results.html?country=united%20states%20of%20america&state=california&category=legal> (last visited Oct. 4, 2018) (on file with *The University of the Pacific Law Review*).

170. VITIELLO, *supra* note 1, at 57.

171. *Bristol–Myers Squibb Co.*, 137 S. Ct at 1780.

172. See Hoffheimer, *supra* note 13, at 504; see also Schmitt, *supra* note 108.

173. Hoffheimer, *supra* note 13, at 505.

174. Schmitt, *supra* note 108, at 769.



sovereignty should inform the doctrine.”<sup>175</sup> Schmitt is clear that his theoretical justification is “a new argument.”<sup>176</sup> In summary, his thesis is as follows: “as a matter of state sovereignty, a state court may exercise jurisdiction only over a defendant that engaged in conduct that significantly implicated interests within the sphere of the state’s sovereign power, that is, the health, safety, and general welfare of its people.”<sup>177</sup>

Schmitt begins his argument with the recognition that the Court has yet to articulate a coherent theory of sovereignty in its personal jurisdiction case law.<sup>178</sup> While many scholars conclude from the lack of coherent theory that none exists,<sup>179</sup> Schmitt wants to find such a justification, almost certainly as part of larger Federalist perspective, limiting not only federal but state power.<sup>180</sup>

At its core, Schmitt argues that state governments have full sovereign power within their borders, unlike the federal government (a government limited by the specific powers granted in the Constitution).<sup>181</sup> That sovereign power is affirmed in the Tenth Amendment.<sup>182</sup> While each state is analogous to a sovereign state, the states’ powers come from the people: each state’s “general power of governing.”<sup>183</sup>

Each state’s power to regulate is largely limited by its borders. A state’s police power “authorizes the assertion of adjudicatory power within the state.”<sup>184</sup> But geography limits states’ power: “it is more difficult to justify a state’s assertion of sovereignty—*whether regulatory or adjudicatory*—over an out-of-state defendant.”<sup>185</sup> Schmitt relies on cases dealing with the states’ regulatory power: “In the regulatory context, the Supreme Court has held that a state cannot directly regulate conduct ‘that takes place wholly outside of the State’s borders.’”<sup>186</sup> Thus, states cannot assert extraterritorial jurisdiction, a limitation grounded in the Commerce Clause.<sup>187</sup>

Schmitt acknowledges that the Court’s case law on extraterritorial jurisdiction is not without its problems. He recognizes that this idea of limiting the extraterritorial effect of a state’s power creates difficulties: “virtually every state regulation has effects beyond its borders.”<sup>188</sup> But he relies on this line of cases to

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175. *Id.*

176. *Id.* at 772.

177. *Id.* at 773.

178. *Id.* at 775.

179. *Id.* at 771.

180. Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 *MISS. L. J.* 59, 62 (2014).

181. Schmitt, *supra* note 108, at 780.

182. *Id.* at 779.

183. *Id.* at 780 (quoting *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012)).

184. *Id.*

185. *Id.* (emphasis added).

186. *Id.*

187. *Id.* at 780–81.

188. *Id.* at 781.

make his core argument: that, as a general rule, states cannot project their laws on disputes that have nothing to do with conduct in their own borders.<sup>189</sup>

The cases limiting extraterritorial application of a state's laws are the regulatory cases referred to above.<sup>190</sup> But Schmitt urges that those cases be applied with equal force to the adjudicatory cases, i.e., the personal jurisdiction cases.<sup>191</sup> Schmitt's position seems partially prescriptive and partially descriptive when he argues that "[s]tate sovereignty concerns are equally applicable to the assertion of adjudicatory power over an out-of-state defendant as to the extraterritorial application of state regulatory power."<sup>192</sup> That is, he urges that the Court apply principles from its regulatory case law, and apply them to personal jurisdiction cases—the adjudicatory rules. He recognizes that constitutional text does not justify his theoretical argument, but he finds it in the structure of federalism.<sup>193</sup> At the same time, he does not cite any Supreme Court case that has adopted his particular explanation for their results, other than in generalized federalism concerns.<sup>194</sup> Thus, Schmitt argues that the Court should adopt his theory, presumably because it will produce sound results.

That raises a number of questions. As indicated, Schmitt does not seriously contend that the text of the Fourteenth Amendment Due Process Clause justifies adoption of his sovereignty theory.<sup>195</sup> To argue otherwise is implausible since the amendment is clearly a limitation on state power.<sup>196</sup> What about the history of the Fourteenth Amendment as it relates to the assertion of personal jurisdiction? Indeed, the history of the amendment seems to undercut a core principle of Schmitt's theory.<sup>197</sup> And if history and text do not support a jurisdiction-narrowing rule, are there nonetheless good policy reasons to adopt a sovereignty-based theory of jurisdiction? Schmitt's theory adapts rules from cases dealing with the regulatory power of the states and grafts them onto the adjudicatory power of the states.<sup>198</sup> Does sound policy urge such a move? In an age of expanded interstate and international dealings, his jurisdiction-narrowing rule seems to make little sense.<sup>199</sup>

*Pennoyer* supports the federalism-structural view of personal jurisdiction.<sup>200</sup>

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189. *Id.* at 782.

190. *See supra* Part II.

191. Schmitt, *supra* note 108, at 782.

192. *Id.*

193. *Id.*

194. *Id.* at 778.

195. *Id.* at 782.

196. *See* Peter Singleton, *Personal Jurisdiction in the Ninth Circuit*, HASTINGS L.J. 911, 917 (2008).

197. *See generally* Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735 (1981).

198. Schmitt, *supra* note 108, at 780.

199. VITIELLO, *supra* note 1, at 22.

200. *Pennoyer v. Neff*, 95 U.S. 714 (1977).

Unless a plaintiff had an out-of-state defendant served in-hand, in-state, the court could not assert jurisdiction over that defendant.<sup>201</sup> Thus, in *Pennoyer*, courts could not reach beyond Oregon's borders to command a defendant in California to return to Oregon to respond to a suit in Oregon.<sup>202</sup> Wait: does that really support Schmitt's theory? Does borrowing limits on the regulatory power of one state to dictate conduct of citizens of other states work in many cases? His theory works based on the facts in *Pennoyer*: the suit in *Mitchell v. Neff*, the case that gave rise to the judgment that led to the sheriff's sale, was for a breach of contract.<sup>203</sup> Neff failed to pay for legal services that Mitchell rendered in Oregon. Hence, the Oregon suit would turn on the application of Oregon state law. But such a conclusion is hardly inevitable when *Pennoyer's* in-hand, in-state rule applied.

A classic question to pose to students after they have read *Pennoyer* is what should Mitchell have done if he could not find Neff in Oregon? One hypothetical might ask whether suing and serving Neff in California would work. The answer is clearly yes. Many students balk if one spins off a different hypothetical: what if Mitchell sued Neff in Idaho, based on the same conduct?<sup>204</sup> Again, some students find the result counterintuitive, clearly the Idaho court would have personal jurisdiction to adjudicate the dispute. In such a case, wouldn't the Idaho court be regulating extraterritorial conduct, seemingly in contradiction to one of Schmitt's premises? The answer might be, no, Idaho would apply Oregon law and so would not be enforcing its own policies.<sup>205</sup>

Maybe. Would Idaho apply Oregon law to Mitchell's contract claim? Probably.<sup>206</sup> Depending on Idaho's choice of law rules, in theory, Idaho might apply Idaho substantive law. Would that mean that personal jurisdiction was not proper? It might raise concerns under the Supreme Court's precedent limiting a state's authority to apply its own law to a dispute.<sup>207</sup> But historically, personal jurisdiction was proper beyond serious debate.

A similar problem might have arisen if, for example, Mitchell learned that Neff owned property in Idaho and began his suit in rem by attaching that property.

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201. *Id.* at 720.

202. VITIELLO, *supra* note 1, at 23.

203. *Pennoyer*, 95 U.S. at 719.

204. See RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 32–333 (7th ed. 2016).

205. Whether Idaho would apply Oregon law would depend on Idaho's choice of law rules. If Idaho adheres to *lex loci*, Oregon law would apply. But some jurisdictions apply *lex fori*, in which case Idaho would apply Idaho's substantive law. Modern jurisdictions typically adopt one form or another of interest-balancing choice of law rules. See Erin Ann O'Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, 9600 GEO. MASON L. REV. 631, 634–42 (1999). In the hypothetical, Idaho would seem to have little interest in applying its own substantive law; but balancing tests are notoriously imprecise and a state might enforce its substantive law despite the fact that the contact was extraterritorial.

206. See Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 340 (2013).

207. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308–099 (1981).

Similar problems arise: the Idaho court might apply its substantive law to the dispute and would again be regulating extraterritorial conduct (contract formation in Oregon). But under the law according to *Pennoyer*, the court would have jurisdiction to adjudicate the claim.<sup>208</sup>

Take that one step further: assume that, had the out-of-state plaintiffs begun suit against BMS in California by attaching its substantial property holdings in California, under the law according to *Pennoyer*, the suit would not have violated due process.<sup>209</sup> That would have been the case until 1978, when the Court narrowed assertions of in rem jurisdiction.<sup>210</sup> What was clear as an historical matter, sovereignty did not prevent such suits.<sup>211</sup>

Yet another example demonstrates that Schmitt's sovereignty theory, grounded in limits on the extraterritorial application of a state's law, has little historical support. At the outset of their decision to sue BMS, the plaintiffs believed that the California courts would have general jurisdiction over BMS.<sup>212</sup> In such a case, one would need to determine, under California's choice of law rules, which states' substantive laws would control the litigation.<sup>213</sup> Apparently, BMS feared that California would apply its pro-plaintiff substantive law, instead of the various out-of-state plaintiffs' state law.<sup>214</sup> But until *Goodyear* and *Daimler*, BMS's substantial California contacts would have been sufficient to uphold jurisdiction.<sup>215</sup> Again, that question would have been quite distinct from the choice of law question.

Although the Court has narrowed in rem and general jurisdiction, consider one more example where a state applies its law to regulate extraterritorial conduct: Imagine a defendant from Alaska on a week-long vacation in Florida, where a plaintiff from Alaska begins suit against the defendant. While the Court was deeply divided with no clear rule emerging, all nine justices who decided *Burnham v. Superior Court* would uphold jurisdiction on those facts.<sup>216</sup> Yet again, we don't know whether the Florida court would apply Florida law in the dispute, but that would not bear on the jurisdictional questions.<sup>217</sup>

In the previous examples, courts would have had jurisdiction over the defendant or property. A separate question would be which states' substantive law would apply. In the examples, I would wager that the forum state would apply

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208. *Pennoyer*, 95 U.S. at 720.

209. Bradt & Rave, *supra* note 13, at 1269.

210. *Shaffer*, 433 U.S. at 212.

211. Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 108–09 (2015).

212. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.

213. See Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 555 (1996).

214. Bradt & Rave, *supra* note 13, at 1278.

215. *Id.* at 1277–78.

216. *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990).

217. See generally *id.*

some other state's substantive law under its choice of law principles.<sup>218</sup> But a contrary holding would not deprive the court the power to hear the case.

Schmitt fails to address a particularly difficult question if sovereignty really matters in personal jurisdiction analysis. His theory largely resuscitates Justice White's *World-Wide Volkswagen* position.<sup>219</sup> The reaction of *World-Wide Volkswagen* was swift and loud: if sovereignty underlies contacts analysis, how can an individual waive personal jurisdiction?<sup>220</sup> Even prior to *Pennoyer*, courts recognized that defendants can consent to jurisdiction.<sup>221</sup> By contrast, as is well established, parties cannot consent to a federal court's subject matter jurisdiction.<sup>222</sup> The difference, of course, is that states have an interest in limiting federal court subject matter jurisdiction, as reflected in Article III's narrow delegation of judicial power.<sup>223</sup> As a result, private litigants cannot waive subject matter jurisdiction. If, as Schmitt asserts, personal jurisdiction analysis must take into account extraterritorial application of a state's laws, how can a private individual consent to jurisdiction in such a case? I find no answer in *Rethinking the State Sovereignty Interest in Personal Jurisdiction*.<sup>224</sup>

If the text and history of Fourteenth Amendment Due Process Clause do not dictate a significant role, if any, for sovereignty as a jurisdiction limiting principle, are there sound policies to support Schmitt's thesis? No, as I have argued elsewhere.<sup>225</sup> We live in an era of interstate and international commerce when communication and transportation may make the burden of defending a suit in a faraway forum almost non-existent.<sup>226</sup> *BMS* admitted as much before the Supreme Court.<sup>227</sup> Also as I argued in *Animating Civil Procedure*, the obvious winners of the Court's new restrictive due process analysis are often mega-corporations.<sup>228</sup>

One might ask whether policies other than a pro-corporate bias may have been at play in *BMS*. As two professors have argued, *BMS* was a case about forum-shopping.<sup>229</sup> Indeed, as Professors Bradt and Rave argue in *Aggregation on*

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218. See generally *O'Connor v. O'Connor*, 201 Conn. 632 (1986).

219. In *World-Wide*, Justice White tied sovereignty to the contacts analysis, not the balance of reasonableness factors. *World-Wide Volkswagen Corp.*, 444 U.S. at 292. *BMS* and Schmitt locate its relevance elsewhere, in the balance of competing factors. While other factors are relevant, the burden on the defendant matters most, in part, because of sovereignty concerns.

220. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident, Alien Defendants*, 41 WAKE FOREST L. REV. 1, 36 (2006).

221. *D'Arcy v. Ketchum*, 52 U.S. 165, 166 (1850).

222. LINDA S. MULLENIX, BLACK LETTER OUTLINE ON CIVIL PROCEDURE 27 (2004).

223. Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, U. PA. L. REV. 1373, 1375 (2014).

224. Schmitt, *supra* note 108.

225. VITIELLO, *supra* note 1, at 27; Vitiello, *supra* note 20, at 218.

226. VITIELLO, *supra* note 1, at 27.

227. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1786–87.

228. VITIELLO, *supra* note 1, at 70.

229. Bradt & Rave, *supra* note 13, at 1251.

*Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, *BMS's* lasting impact is likely to be on "the balance of power in complex litigation."<sup>230</sup> As developed below, perhaps the Court was more concerned about inappropriate forum-shopping than about basic personal jurisdiction doctrine.

Upon filing in-state court in California, the plaintiffs in *BMS* seemed to have succeeded in significant forum-shopping, including blocking *BMS* from removing the action to federal court.<sup>231</sup> By joining *BMS's* marketing firm McKesson, *BMS* could not remove the action to federal court.<sup>232</sup> By filing separately, rather than by seeking class certification, the plaintiffs avoided removal under the Class Action Fairness Act, which allows removal even absent complete diversity and even if a defendant is an in-state defendant.<sup>233</sup> Thus, the plaintiffs seemed to skirt two developments that have often frustrated mass-tort plaintiffs.<sup>234</sup> As summarized by Bradt and Rave:

When, in the 1990s, numerous decisions by federal courts made it difficult to certify mass-tort class actions, plaintiffs' lawyers turned to more accommodating states. To combat that tactic, defense-friendly interest groups convinced Congress to pass the Class Action Fairness Act of 2005 (CAFA), which expanded federal subject matter jurisdiction to return them to hostile federal courts.<sup>235</sup>

*BMS* succeeded in outmaneuvering the plaintiffs by winning its motion to dismiss for lack of personal jurisdiction.<sup>236</sup>

The result of the Court's holding in *BMS* largely favors defendants in the forum-shopping arena. Plaintiffs must either sue in their home states, if that is where they used a defendant's product, or in a place where a corporate defendant is "at home."<sup>237</sup> In the vast majority of cases, a defendant is at home only in its state of incorporation or the state where it has its principal place of business.<sup>238</sup> In the first instance, the group of plaintiffs joining in the suit is likely to be smaller than had *BMS* been decided in plaintiffs' favor.<sup>239</sup> Although not inevitable, large corporate defendants will often have a home court advantage in states where they are "at home." That would seem to follow from the defendant's choice to affiliate

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230. *Id.* at 1256.

231. *Id.* at 1254.

232. *Id.* at 1275.

233. *Id.*

234. *Id.* at 1255.

235. *Id.*

236. *Id.* at 1276.

237. *Id.* at 1279–801281.

238. *Id.* at 1291; *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

239. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1773.

with the state where it is at home.<sup>240</sup> Further, local citizens may favor a large corporation that provides jobs and tax revenue to their local economy over plaintiffs from around the country, who may seem like interlopers.<sup>241</sup>

Bradt and Rave, however, posit a third option. The third option is to file in their own home courts, if they can assert jurisdiction over the defendant based on a specific jurisdiction theory.<sup>242</sup> But if the plaintiffs want efficiency, they can file in federal court and then use the special venue provision, § 1407,<sup>243</sup> allowing a transfer of venue for purposes of pretrial proceedings. This thesis offers an interesting insight into *BMS*.

Depending on the forum and circumstances, plaintiffs and defendants sometimes favor mass-tort litigation.<sup>244</sup> Litigation against large corporations, like the tobacco industry, invited collaboration among plaintiffs.<sup>245</sup> Plaintiffs may be able to locate extremely pro-plaintiff state courts, often in rural areas where jurors and judges showed a dislike for large out-of-state corporations.<sup>246</sup> In some instances, defendants and business groups have favored aggregation of claims.<sup>247</sup> For example, in the 1960s, insurance companies sought to use interpleader as a way to take control of litigation, forcing injured plaintiffs to try their cases as part of a larger interpleader action.<sup>248</sup> A defendant corporation might favor aggregation of claims in a jurisdiction where the state allows liberal use of offensive issue preclusion.<sup>249</sup> Often, as Bradt and Rave suggest, a preference for aggregation may depend on where aggregation will take place.<sup>250</sup> As CAFA demonstrates, defendants have felt more at home in federal than in state courts for over a decade.<sup>251</sup> Given recent developments in Congress's frustration of President Obama's appointment of judges to the federal bench<sup>252</sup> and Congress's collaboration with President Trump to reshape the federal bench,<sup>253</sup> that tendency

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240. Bradt & Rave, *supra* note 13, at 1293.

241. See Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. OF LEGAL ANALYSIS 245, 247 (2014).

242. Bradt & Rave, *supra* note 13, at 1292.

243. 28 U.S.C. § 1407.

244. Bradt & Rave, *supra* note 13, at 1256–57.

245. *Id.* at 1294.

246. *Id.* at 1302.

247. See Kevin M. Lewis & Wilson C. Freeman, *Class Action Lawsuits: A Legal Overview for the 115th Congress*, CONGR. RESEARCH SERV. 1, 3–4 (2018).

248. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967); see also *Pan Am. Fire & Cas. Co.*, 188 F. Supp. 474, 476 (1960); see also *N.Y. Life Ins. Co. v. Dunlevy*, 241 U.S. 518, 520 (1916).

249. Bradt & Rave, *supra* note 13, at 1265.

250. *Id.* at 1267.

251. *Id.* at 1255.

252. Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done With Them* BROOKINGS (June 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/> (on file with *The University of the Pacific Law Review*).

253. Sean Sullivan & Mike DeBonis, *With Little Fanfare, Trump and McConnell Reshape the Nation's Circuit Courts*, WASH. POST (Aug. 14, 2018), <https://www.washingtonpost.com/powerpost/with-little-fanfare-trump-and-mcconnell-reshape-the-nations-circuit-courts/2018/08/14/10610028-9fcd-11e8-93e3->

no doubt will continue.

Insofar as *BMS* is a case about forum selection in mass-tort cases, who is the winner? MDL has real advantages, including very significant cost savings for the courts and for the litigants.<sup>254</sup> Often, MDL ends the litigation with the judge moving the case to a global settlement.<sup>255</sup> That seems like a net win for all of us, including plaintiffs and defendants.<sup>256</sup> Bradt and Rave suggest that the solution, although not ideal, “offers potential benefits to plaintiffs and the court system as well by creating opportunities for mass resolution that can benefit all parties.”<sup>257</sup> Viewed as such, one might understand why three of the more liberal justices joined even though the decision tends to close the courthouse door in favor of large corporations over injured plaintiffs.

Perhaps Justices Ginsburg, Breyer, and Kagan joined Justice Alito’s opinion out of concern about undue forum-shopping. In *Animating Civil Procedure*, I speculated that the liberal justices might have narrowed general jurisdiction, for example, out of concern about unwarranted forum-shopping, rather than a simple pro-corporate bias.<sup>258</sup> But, as Justice Sotomayor explained in her concurring opinion in *Daimler*, overly expansive use of general jurisdiction could have been addressed with a less extreme solution than the majority’s extreme revision of general jurisdiction standards.<sup>259</sup>

In addition, the Court has not addressed openly why it disfavors plaintiff-forum-shopping.<sup>260</sup> Its decisions, including *BMS*, favor defendant-forum-shopping over plaintiff’s forum selection.<sup>261</sup> The Court had an opportunity to decide the case on different grounds. For example, during oral argument, Justice Kagan asked what made the assertion of jurisdiction by the California court unconstitutionally unfair.<sup>262</sup> *BMS*’s counsel objected to “California’s supposedly biased procedural and choice-of-law rules,”<sup>263</sup> while counsel had to admit that the burden on defending in California was virtually non-existent.<sup>264</sup> *BMS*’s position seemed to dictate examination of whether California had a sufficient interest to apply its substantive law to a dispute arising elsewhere.<sup>265</sup> That poses a very different question than involved in *BMS* and revisiting the extent to which a state can apply

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254. Bradt & Rave, *supra* note 13, at 1267.

255. *Id.*

256. *Id.* at 1268.

257. *Id.* at 1259.

258. VITIELLO, *supra* note 1, at 65.

259. *Daimler AG*, 571 U.S. at 142–60 (Sotomayor, J., concurring).

260. VITIELLO, *supra* note 1, at 67.

261. *Id.*

262. Bradt & Rave, *supra* note 13, at 1279.

263. *Id.*

264. *Id.* at 1277.

265. *Id.*



its law to a dispute arising elsewhere might be timely. Such a decision might squarely address unfair forum-shopping while keeping the courthouse door open in an otherwise convenient forum.<sup>266</sup>

Consistent with Bradt and Rave's article, one might also see *BMS* as an effective way to handle mass-tort litigation.<sup>267</sup> Legal experts have long been concerned about developing an efficient method of handling mass-tort cases<sup>268</sup> On occasion, as with CAFA<sup>269</sup> and with § 1369,<sup>270</sup> Congress has created narrow provisions to deal mass-tort and class action cases. But Congress has never created a "bill of peace" for litigation generally.<sup>271</sup> Think back to the 1960s, when the insurance industry tried to use interpleader as a way to control tort litigation. For example, in *State Farm v. Tashire*, State Farm insured a driver in a major collision that occurred in northern California.<sup>272</sup> Several injured plaintiffs filed actions against the bus company and truck driver involved in the action.<sup>273</sup> State Farm filed an interpleader action in federal court in Oregon, a state that seemingly had nothing to do with the accident.<sup>274</sup> The Supreme Court had to decide whether the use of federal statutory interpleader was proper.<sup>275</sup>

When I teach *Tashire*, I try to get my students to see the brilliance of the attempted defense industry strategy. Subject matter jurisdiction was proper in federal court because § 1335 requires only minimal diversity.<sup>276</sup> Personal jurisdiction was proper based on § 2361, allowing for nationwide service of process.<sup>277</sup> Further, the federal court would apply the choice of law rules of the state where the federal court sits.<sup>278</sup> Finally, interpleader is one of the exceptions to § 2283, the anti-injunction statute.<sup>279</sup> Thus, the federal court has the power to enjoin state proceedings from the same accident.<sup>280</sup> The district court found that interpleader was proper and enjoined the state proceedings. The Ninth Circuit found that interpleader was improper.<sup>281</sup> While the Supreme Court found that

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266. Allstate Ins. Co., 449 U.S. at 308–09.

267. Bradt & Rave, *supra* note 13.

268. *Id.* at 1254–55.

269. Pub. L. No. 109-2, 119 Stat. 4 (2005).

270. 28 U.S.C.A. § 1369 (Westlaw through Pub. L. No. 115-281).

271. See *State Farm v. Tashire*, 386 U.S. 523 (1964). Congress has enacted limited mass tort statutes, but never a broad statute dealing with all mass tort cases. See, e.g., 28 U.S.C. § 1369 (2002); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 841 (1995).

272. 386 U.S. 523 (1967).

273. *Id.* at 525.

274. *Id.*

275. *Id.* at 528.

276. 28 U.S.C. § 1335 (1948).

277. *Tashire*, 386 U.S. at 528 n.3.

278. *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496–97 (1941).

279. Donald L. Doernberg, *What's Wrong With This Picture?: Rule Interpleader, the Anti-Injunction Act, In Personam Jurisdiction, and M.C. Escher*, 67 U. COLO. L. REV. 551, 553, n.11 (1996).

280. *Tashire*, 386 U.S. at 528.

281. *Id.* at 529.

interpleader was proper, it held that the district court abused its discretion in enjoining the state court proceedings.<sup>282</sup>

The Supreme Court recognized the defendants' concerns about multiple litigation of claims arising from the same transaction.<sup>283</sup> Importantly, the Court ruled that Congress had not enacted a Bill of Peace.<sup>284</sup> In effect, the Court held that the lower court was using a procedural device as a Bill of Peace, well beyond its intended procedural effect.<sup>285</sup>

If Bradt and Rave are correct, *BMS* fell into the same trap as did the lower court in *Tashire*. Plaintiffs faced with mass-tort litigation will seek MDL as a matter of routine because the Court narrowed personal jurisdiction.<sup>286</sup> Consciously or unconsciously, the Court distorted due process analysis to achieve a cost savings solution to mass-tort litigation.<sup>287</sup> That would seem to be the job of Congress. In fact, Congress has addressed mass-torts when it enacted CAFA<sup>288</sup> and § 1369.<sup>289</sup> The fact that those provisions did not apply to the litigation in *BMS* suggests that the Court's use of personal jurisdiction to force litigants into MDL was illegitimate as a matter of policy.

#### IV. CONCLUSION

Open the morning paper and you can find attacks on the rule of law. As I wrote this paper, for example, President Trump railed against former Attorney General Jeff Sessions and the Department of Justice for filing criminal charges against Trump loyalists up for reelection to Congress.<sup>290</sup> Happily, such blatant attacks on the rule of law get the attention of the news media and the public.<sup>291</sup>

As I have argued in *Animating Civil Procedure*, the Court has more subtly eroded the rule of law with its civil procedure decisions.<sup>292</sup> Public outrage at the Court's procedural decisions is unlikely.<sup>293</sup> But the aggregate effect of those decisions is a powerful assault on the rule of law.<sup>294</sup> A full set of formal substantive rights is worth little without a convenient forum in which to bring one's claim, a

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282. *Id.* at 533.

283. *Id.* at 534.

284. *Id.* at 535–36.

285. *Id.*

286. Bradt & Rave, *supra* note 13, at 1295.

287. *Id.* at 1295.

288. 28 U.S.C.A. § 1332(d) (Westlaw through Pub. L. No. 115-281).

289. 28 U.S.C.A. § 1369 (Westlaw through Pub. L. No. 115-281).

290. *Trump Attacks Sessions Over Prosecutions of Republicans*, BBC NEWS (Sept. 4, 2018), <https://www.bbc.com/news/world-us-canada-45405757> (on file with *The University of the Pacific Law Review*).

291. VITIELLO, *supra* note 1, at xiv.

292. *Id.* (citing Linda Mullenix, *Federal Class Actions: A Near-Death Experience in a Shady Grove*, 79 GEO. WASH. L. REV. 448 (2011)).

293. *Id.* at xvi.

294. *Id.* at xv.

forum that allows access to information necessary to make one's case.<sup>295</sup>

*BMS*'s breadth is open to debate. Perhaps, as Professors Bradt and Rave have argued, it has little lasting effect on most lawsuits.<sup>296</sup> But its reinsertion of federalism into the due process analysis narrows jurisdiction in some meaningful class of cases.<sup>297</sup> Further, looking at only one decision at a time ignores the larger impact on access to justice.<sup>298</sup> Finally, even the members of the Court advanced multiple policies in *BMS*, the winners are mega-corporations, the losers, injured plaintiffs.<sup>299</sup>

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295. *Id.*

296. Bradt & Rave, *supra* note 13, at 1255–56.

297. VITIELLO, *supra* note 1, at 10.

298. *Id.* at 67.

299. *Id.* at 70.